Supreme Court, U.S.
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No. 96-1732

In The

Supreme Court of the United States

October Term, 1996

MCDANIEL JACKSON and MIRIAM JACKSON,

Petitioners,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether due process was denied the Petitioners, in that notice of class action *pendency* and of *opt-out rights* was *not* given to the last-known address of the Petitioners nor their counsel, contrary to the *individual notice* and "reasonable effort" required for due process and required by the District Court's Orders governing class notice, although the Respondents knew the address used for the Petitioners was not accurate, knew the Petitioners' accurate mailing address, and knew that the Petitioners were represented by counsel in a pending arbitration against the Respondents.

2. Whether due process was denied the Petitioners, in that the proceedings below incorrectly evaluated the adequacy of the giving of notice to the Petitioners, as to class *pendency* and class *opt-out rights*, by the more lenient notice standards of *settlement*.

3. Whether the Circuit Court of Appeals erred by its use of an "abuse of discretion" standard, instead of making a *de novo* review of the Petitioners' Fed. R. Civ. P. 60 (b)(4) Motion, which Motion alleged the class Final Judgment was void, as to the Petitioners, because due process was not provided to the Petitioners in that *no* notice of class action *pendency* nor of *opt-out rights* was given to the Petitioners' last-known address.

LIST OF PARENT COMPANIES

Petitioners refer to the "LIST OF PARENT COMPANIES" appearing at Page ii of their Petition for Writ of Certiorari. There are no amendments to be made to said list to make it current, as to Petitioners.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Prudential's Brief in Opposition[1] is remarkable – for factual misrepresentations throughout, and pervasive ignoring of the legal requirements, notably Fed. R. Civ. P. 23(c)(2) class "best notice practicable", and "reasonable effort" for class member identification. The case citations of Prudential are, uniformly, inapposite.[2]

Prudential is non-responsive in substance to the Jacksons' arguments. Prudential would have strict Civil Rule 23(c)(2) pendency and opt-out notice, of *Mullane, Eisen* and *Phillips Petroleum*[3] and similar cases, applied solely in judicial discretion, if, when, and as the presiding judge might order it.

Petitioners directly urged to the Second Circuit, in Briefs and oral argument, their point, "THE NOTICE PROVISIONS, AS ENFORCED IN THIS CASE, DID NOT COMPORT WITH DUE PROCESS REQUIREMENTS".[4]

In spite of this, Petitioners' concerns were ignored. App. Toland 10-11. The Second Circuit Summary Order focussed only on claimed "excusable neglect" (App. Toland 6). It did not state a word as to "reasonable effort" – if any – of

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[1] This Reply is made by, and on behalf of, solely the Jackson Petitioners as to Prudential's opposition to their Petition.

[2] Petitioners' last two Questions deal purely with legal standards wrongly-applied to Petitioners by the Circuit Court, or uncorrected by the Circuit Court. Prudential's claim this is "fact-specific" is undiluted sophistry.

[3] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) (Rehnquist, J.).

[4] Joint Brief of Appellants, 3, 43-48; Supplemental Brief of Jacksons, 3-5; Joint Reply Brief of Appellants, 14-23; Supplemental Reply Brief of Jacksons, 3.

Prudential (App. Toland 10-11, and 1-23). This summary treatment is directly in conflict with the rigorous procedures of the Fifth Circuit, *In re Nissan Motor Corporation Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) (herein, "*Nissan*"), and the Third Circuit, *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3rd Cir. 1973), *reh. den.*, 483 F.2d at 834, (herein, "*Villager*"). As the Circuits are in conflict, certiorari is proper.

The Second Circuit's use of an "abuse of discretion" standard, and lack of *de novo* review (App. Toland 6, 10-11) conflicts with the Ninth Circuit's *de novo* review required for Rule 23(c)(2) construction, *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995), *cert. den.*, ___ U.S. ___, 116 S.Ct. 1355 (1996). As the Circuits are in conflict, certiorari is proper.

As to such a summary analysis in Petitioners' case: If such chicanery – *sending a Class pendency and opt-out notice to Petitioners, in care of yourself, the Defendant, without proven, timely notice effort* – is an "everyday, garden variety, prototypical notice program" (Br. Opp. to Jackson 8-9; Br. Opp. to Toland 21), such phony notice-giving is so great a departure from due process under *Mullane, Eisen* and *Phillips Petroleum* as to necessitate certiorari.

Prudential's claim of Petitioners' due process concerns as "parochial" ignores the obvious point: Reasonable pendency and opt-out notice is key, setting apart Rule 23(c)(2) from all other class notice rules, to extinguish individual suits. Prudential has used multiple class actions, defensively, to terminate many cases; This strategy may also be practiced by other industries, right now.[5]

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[5] *Despite S.E.C. Accord, Prudential Fights On*, New York Times, Nov. 4, 1993, at 1, col. 3; *Insurer Struggles to Resolve Sales-Practice Litigation, as Many Units Stumble*, Wall Street Journal, January 24, 1997, 1997 Westlaw-WSJ 2406979.

See also *Tobacco Faces Year of Courtroom Drama*, Wall Street Journal, February 10, 1997, 1997 Westlaw-WSJ 2408924.

The adequacy, and corresponding proper execution, of pendency and opt-out notice procedures ought to be a significant concern to this Court. Correcting a lack of "reasonable effort", as such lack occurred for Petitioners, will ripple out, throughout class actions, far beyond impact as to only these two Petitioners. The "cert-worthiness" of correcting Prudential's, and/or Lead Class Counsel's, deliberate disregard for Rule 23(c)(2) opt-out notice procedures -- an egregious violation of Petitioners' due process – is clear.

I.

THE "BEST NOTICE PRACTICABLE" WAS NOT GIVEN PETITIONERS, AND "REASONABLE EFFORT" WAS NOT USED TO GIVE NOTICE OF PENDENCY AND OF OPT-OUT RIGHTS TO THEM

Prudential has not shown in its Brief how mailing pendency and opt-out notice, to Petitioners, *in care of Prudential itself* (App. Jackson 81-83), was the "best notice practicable" for Petitioners, nor use of "reasonable effort" to identify Petitioners and their address. This is especially-troubling, with the non-use (and the non-explanation, for non-use) of Petitioners' change of address, notice which Petitioners gave almost one year earlier – Notice which Prudential never denied receiving. (App. Jackson 84).

Prudential's claim that it later gave timely notice – evidenced by its Nittolo Affidavit, which does *not* state any mailing *date* nor mailing *address* for Petitioners (App. Jackson 88-89; *Cf.* Pet. 17 n. 5), is an effort to change the subject. It is no proof of giving Constitutional opt-out notice. (The Nittolo/Prudential mailing – whenever it happened – also violated the District Court's Class Order, requiring *Lead Class Counsel* to mail notice by a date certain. Pet. 18; App. Jackson 7.)

Prudential falsely re-casts the "Question Presented" as to the Jacksons (Br. Opp. i), as to a specious "burden of

proof" of not having *received* notice (Prudential contradicting its own claim, that receipt of notice does not matter!). Prudential tries to change the subject: By trying to shift attention onto everything and everyone, downstream of, and other than, where Civil Rule 23(c)(2) requires attention be placed: *viz.*, the "reasonable effort" – or not – used to identify Petitioners.[6]

Petitioners already have discussed (Pet. 7-9, 16-19) the old "direct investment" database, and its lack of nexus: To Prudential records used for other, routine, monthly mailings, and to other persons' changes of address (Pet. 8; *Cf.* Pet. 24,

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[6] During the tape-recorded appellate hearing, the Second Circuit did ask Prudential:

> "But wasn't it based on the assumption that the notice would go to the last-known address?"

To which, Prudential's Supreme Court counsel, with hardy candor, replied: "*No, your honor.*" (emphasis added)

The Second Circuit also briefly questioned Prudential's Supreme Court counsel, as to the much-touted "direct investment" database. Prudential's Supreme Court counsel elusively described it as:

> "*That list is what it is;* It was not prepared for the EDAP; *It was not prepared for the SEC; There's no record evidence* that it was two years out of date *or anything else; It is what it is . . . There is no more recent list . . .* "(Emphasis added).

Such a Prudential sham, instead of Constitutional due process, should be disavowed by this Court. Moreover, Prudential's statement (no more-recent list) is at odds with Prudential's seeming use, for some address changes here, of its own, other records. *Cf.* Pet. 8; Pet. 24 n. 6; App. Toland 29, 31.

Further, Prudential's quoted statement, yesterday, to the Circuit Court, that the database was "not prepared for the SEC", is not what Prudential says, today (Br. Opp. 4 n. 3, last sentence).

n. 6) engineered by Prudential.[7] Petitioners' year-old address-change notice went un-used. App. Jackson 84.

In its Brief, Prudential is, surprisingly, silent as to all such matters.[8] Such exceptional trickery – mailing of pendency and opt-out notice, addressed to oneself, the settling Defendant – corrodes Civil Rule 23(c)(2) opt-out notice, which is targeted to binding, permanent resolution of litigant claims. *Cf. Villager, supra; see also* Pet. 15-16.[9]

Prudential would excuse an easily-forseeable error – the litigation parties' use of *Defendant's own business office name and address*, for pendency and opt-out notice.[10] App. Jackson

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[7] That 1,099 changes of address – and many more – were given by Prudential to the mailing-label-printer [App. Toland 31, 29] belies the misrepresentation, by Prudential's Supreme Court counsel, in speaking to the District Court on Petitioners' Rule 60(b)(4) Motion, that:

> " . . . the mailing list that was used by Prudential . . . something called direct investment database . . . *was the most recent and current database available to Prudential* . . . " A-1442. (Emphasis added)

[8] Prudential failed to offer any record cite for its unproved statement (Br. Opp. to Toland 23), that its "direct investment" database contained "virtually all" Class members (A point left out of its Brief opposing the Jacksons): Presumably, if that evidence were in this record, Prudential would cite it – over and over again.

[9] In apparent total candor, Prudential's Supreme Court counsel spoke to the District Court as to Prudential's strong motives:

> " . . . Prudential *who is the primary proponent of getting people into this settlement* . . . " A-1441. (Emphasis added)

[10] *Cf. Peters v. National Railroad Passenger Corporation*, 966 F.2d 1483 (D.C. Cir. 1992) (Mailed to residence address, lacking apartment number; "Not reasonably forseeable" that address was incomplete, without an apartment number.)

81-83. Petitioners never pled to "verify" and "re-verify" all addresses, for "100% accuracy": *Petitioners pled only for Prudential reasonably to use the data it has.* Pet. 11-12, 19; App. Jackson 84. Using readily-available addresses, or data already-possessed by the sender, is sufficient to cut off valuable property rights. If that information is non-used, as here, due process is not provided, in forfeiture nor other cases – running from *Mullane* (itself a forfeiture case) and *Eisen,* through many, many other cases. Pet. 14; 18-20.

Although Petitioners specifically stated an issue of proper Rule 23(c)(2) *pendency* and *opt-out* notice law – not incorrect Rule 23(e) *dismissal* or *compromise* notice (Pet. at i, 20-24) – Prudential still cites only inapposite, settlement-notice cases. Prudential's case, *Gross v. Barnett Banks,* 934 F. Supp. 1340 (M.D. Fla. 1995) (Br. Opp. 13 n. 7) was decided on incorrect precedent; *Gross* should be disregarded.[11] Prudential's reference (Br. Opp. to Jackson 12, referring to Br. Opp. to Toland 22), except for *Mullane* and *Eisen,* ignores the inappositeness, or else the thrust, of its cited cases; As to those cases, *see* Jacksons' Pet. 24. Except only for the proper decision of *Nissan, supra,* Prudential's collection of cited cases[12] are inapposite to Petitioners, or else actually support Petitioners.[13]

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[11] *Gross* turned on (934 F. Supp at 1345), and cited for support, *Burns v. Elrod,* 757 F.2d 151, 154 (7th Cir. 1985). *Burns* dealt with a Rule 23(b)(2) class (*Ibid.,* at 152) – Unlike the instant Rule 23(b)(3) Class, thus not subject to strict Rule 23(c)(2) notice. Moreover, *Burns* was expressly-decided under Rule 23(e), *judicially-discretionary* notice. *Id.,* at 154.

[12] Br. Opp. to Jackson at 12: Prudential's citing to its Br. Opp. to Toland at 23 including n. 22 therein.

[13] *Gross, supra,* decided on *inapposite precedent;* Another case, approving notice sent to "open" mortgage class members, *using addresses possessed by the Defendant;* A case of *no dispute* that notice procedures were *properly-followed;* A case of *entirely-*

Prudential has cited (Br. Opp. to Toland 23, n. 22) the stunningly-inapposite *Valente v. Pepsico, Inc.*, 89 F.R.D. 352, 363 (D. Del. 1981): A case of *late-filed claims; Mullane, Eisen* and Civil Rules 23(b)(3) and 23(c)(2) are *not even mentioned.* Prudential's lack of legal precision is obvious, and appalling.

II.

THE PROCEEDINGS BELOW INCORRECTLY JUDGED THE ADEQUACY OF NOTICE OF CLASS PENDENCY AND NOTICE OF OPT-OUT RIGHTS, AS TO PETITIONERS, BY THE MORE LENIENT STANDARDS OF CLASS SETTLEMENT NOTICE

Prudential misrepresents Petitioners' second Question (Br. Opp. 13-14 n. 8). Prudential falsely implies the District Court gave no great weight to Civil Rule 23(e) judicially-discretionary notice law (applicable only to class *dismissal* or *compromise*).

The District Court Opinion is as Petitioners stated it; Reading the District Court Opinion will show it to be so. Pet. 20-24; App. Jackson 53-55, 57-58. The District Court mentioned *Mullane* and *Eisen*, but placed its *emphasis* on cases expressly-decided on Rule 23(e) *settlement* notice principles. Pet. 21-22. *The District Court adopted language stating the court's discretion* – adopted from *a Rule 23(e) settlement notice* opinion, *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975), *cert. den.*, 423 U.S. 864 (1975). (*The District Court also relied on other settlement notice cases.* Pet. 21-22; App. Jackson 54.) Prudential's argument – that Petitioners "distort" the District Court Opinion, by Petitioners' quoting it – should not be taken seriously.[14]

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non-U.S.-resident Plaintiffs, of whom *one-half could never be identified*, holders of "bearer" bonds; and a hard-to-define cattle industry class, with *no single list/source of names.*

[14] Prudential's assertion – as to *Grunin* relying on *Eisen* – misses the point. *Grunin* is a Rule 23(e) *settlement* case. 513 F.2d

The District Court's application of *judicially-discretionary settlement* notice law, instead of mandatory "best notice practicable" Rule 23(c)(2) *pendency* and *opt-out* notice doctrine, was the application of a wrong legal standard to Petitioners. The District Court's own comprehension of what it did is shown by its citing its own Prudential case, in another recent case:

> " . . . These courts have held class members bound to class action *settlements* even where notice was sent to outdated addresses despite the defendants' possession of updated address information. See .-. . *Prudential*, 164 FRD 369-70 . . . " *Presidential Life Insurance v. Milken*, 946 F. Supp. 267, 278 (S.D.N.Y. 1996) (Pollack, J.) (emphasis added)

This citation to *Prudential* is to the District Court's "Incorrect Address" Opinion denying relief to Petitioners. (App. Jackson 42, 57-58) Thus, the District Court evidenced its own understanding: It was applying more-lax *settlement* notice standards to Petitioners, not the rigorous standards required as to *pendency* and *opt-out* notice.

III.

THE CIRCUIT COURT OF APPEALS ERRED BY NOT MAKING *DE NOVO* REVIEW, AND INCORRECTLY APPLIED AN "ABUSE OF DISCRETION" STANDARD, IN REVIEW OF PETITIONERS' FED. R. CIV. P. 60 (b)(4) MOTION MADE ON VOIDNESS AND DUE PROCESS GROUNDS

Petitioners stated that Civil Rule 6 grounds, "excusable neglect", are one of two grounds on which Petitioners pled

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at 114, 121. The instant District Court relied on *Grunin* for judicially-"discretionary" powers. That is an improper standard, under *Mullane, Eisen, Phillips Petroleum* – and Rule 23(c)(2).

alternately. Pet. 25-26. Prudential prefers use of Rule 6. However, Prudential ignores that Petitioners also urged Rule 60(b)(4) grounds (" . . . the judgment is void . . . ") – and only subsection (b)(4), and no other of Rule 60 – consistently, throughout both the District and appellate courts. Pet. 25-26; App. Jackson 68, 70, 91, 93, 94.

Rule 60(b)(4) analysis, "voidness", necessarily *must* be rigorous, *not* as to "abuse of discretion". The reason was described previously (Pet. 28): Analyzing pendency and opt-out notice, by reference to a "discretionary" standard, as these lower courts did, *corrupts a mandatory notice standard, into a discretionary one.* Such discretion is improper. Pet. 28-29. *De novo* review as to Rule 23(c)(2) is required. *Schwarzschild v. Tse, supra,* 69 F.3d at 295.

The two cases cited by Prudential are, again, inapposite. One Prudential citation[15] considers a Civil Rule 6 – not Rule 60 – motion, inapposite to Question III herein and to due process.

Prudential's second citation[16] is not dispositive. That opinion, *Browder,* expressly was *not* decided on Rule 60(b), and certainly not subsection (b)(4). 434 U.S. at 263 n. 8. Thus, *Browder* offers no support. Moreover, the precedent in *Browder,* for this Court's view that a Rule 60(b) motion is reviewed for abuse of discretion (*Id.,* at 263), actually supports Petitioners.[17] *De novo* appellate review, made in *Brennan* – a case cited by *Browder* – was not given Petitioners.

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[15] *Lujan v. National Wildlife Federation,* 497 U.S. 871, 895-6 (1990).

[16] *Browder v. Director, Department of Corrections,* 434 U.S. 257, 263 n. 7 (1978) (herein, "*Browder*").

[17] *Brennan v. Midwestern United Life Insurance Company,* 450 F.2d 999 (7th. Cir. 1971), *cert. den.,* 405 U.S. 921 (1972), on a Rule

Use, or not, of "reasonable effort" to identify Petitioners and send opt-out notice, is *never* mentioned by the Circuit's Summary Order. App. Toland 10-11, 1-23.[18]

CONCLUSION

For the reasons above and in their Petition, granting of certiorari, vacating the appellate Summary Order, and rendering judgment in Petitioners' favor, excluding them from this Class, is appropriate. Thus, Petitioners again respectfully urge this Court to grant certiorari.

Respectfully submitted,

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60(b)(4) Motion for class members' relief: The court in *Brennan* gave, in effect, a *de novo* review. 450 F.2d at 1003-1005.

The other opinion underlying *Browder, Daily Mirror v. New York News*, 533 F.2d 53 (2nd Cir. 1976), *cert. den.*, 429 U.S. 862 (1976), is fully-distinguishable. *Daily Mirror* was a non-specific Rule 60(b) Motion, with no due process discussion – on dismissing Plaintiff's lawsuit for want of prosecution, dormant four years. Petitioners here actively seek arbitration against Prudential, for its deliberate fraud (App. Jackson 66).

[18] Prudential wishes that its claim of Second Circuit *de novo* review (never mentioned in the Circuit Summary Order, nor recounted in Prudential's Brief), by alleged full questioning at the tape-recorded oral argument, were correct (but Prudential thus concedes *de novo* review is proper on a Rule 60(b)(4) Motion).